SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 740.

ALBERT & J. M. ANDERSON MANUFACTURING CO.,

vs.

THE UNITED STATES.

APPELLANT'S BRIEF.

If the cancellation clause in the Emergency Shipping Fund section of the Act of June 15, 1917, had been really intended to apply to government contracts, what would have been its purpose? Obviously, to relieve the government from its obligation to accept vast quantities of supplies that would not be needed in case of an early or unexpected close of the war. Yet the court below does not, in any of its opinions, even hint that such was the purpose of the provision. Why? Because, under the construction put by it on the "just compensation" clause, the government would be in the position of repudiating, in part, the obligations of its "existing" contracts for supplies if it should cancel those contracts at the close of the war. The failure of the court below to refer to this phase of the case, which cannot possibly have escaped its attention, is a confession of the weakness of its position.

ARTHUR H. RUSSELL,
Of Counsel.

CHAPMAN W. MAUPIN,
Attorney for Appellant.

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STATEMENT OF THE CASE.

This is a suit to recover damages for the breach by the United States of an express contract between it and the claimant, by refusing to comply with the terms thereof and attempting to cancel the same, there being no cancellation clause in the contract.

The contract (Navy Department No. 31,192), entered into July 23, 1917, was for the manufacture and delivery of 250,000 four-inch brass shell cases, at the price of $5.55 per case, the government to furnish the materials for the manufacture. On December 19, 1918, when nearly four-fifths of the 250,000 cases had been made and delivered, defendant ordered claimant to discontinue work, and shortly thereafter requested claimant to submit a statement of what it would con-

sider a fair adjustment of its loss by reason of the partial cancellation of its contract.

A prior contract (Navy Department No. 29,855) for the manufacture of 65,000 of the same cases, at $7.65 per case, (government to furnish the copper, and claimant, the spelter), had been fully performed before deliveries under contract No. 31,192 began.

When work under contract No. 31,192 was finally stopped, claimant had delivered, and defendant accepted, 200,066 of the cases, leaving 49,934 cases which, in consequence of defendant's orders in the premises, were never made and delivered. Claimant submitted the desired statement of its loss, and about six months thereafter defendant offered to pay it $17,629.12 in satisfaction of its claim, having in the meanwhile caused an examination of its books, records, and accounts to be made by naval accountants.

The Department arrived at this sum by amortizing the expenses incurred by claimant in providing special facilities for the performance of the two contracts, deducting from the amortized fund the sum of $87,000, supposed to represent profits included by claimant in its bid for the first contract, pro-rating the balance between the performed and the unperformed part of the two contracts, and deducting from the amount prorated to the unperformed part the sum of $14,365.46, which the Department estimated claimant would have had to expend for tools in the completion of the unperformed part of the second contract. (See tabulated statement, Rec., p. 12.)

The court below found that claimant would have realized a profit of $96,102.97 from the uncompleted part of the contract if full performance had been allowed—that being the difference between the cost of

production and the contract price of the 49,934 cases that were not made. (Rec., p. 13, Finding XI.)

The court below found also that the amount expended by claimant for special facilities for the performance of the two contracts was the sum of $275,884.60, of which the sum of $43,727.71 was chargeable to the unperformed part of the second contract. This latter sum the court arrived at by refusing to deduct from the amortized fund the $87,000 supposed to represent claimant's profits on the first contract, and by refusing to deduct from that part of the fund prorated to the unperformed part of the second contract the $14,365.46 estimated for tools for the completion of that contract. (Rec., p. 13, Finding XII.)

Accordingly judgment was entered for the claimant in the sum of $43,727.71, that portion of the expenditure for special facilities chargeable to the unperformed part of the contract, but no opinion was filed, as the findings of fact touching the question of measure of damages brought the case within the purview of the ruling of the court in *Meyer Scale, etc., Co.* v. *United States* and *Russell Motor Car Company* v. *United States* (not yet reported), that the "just compensation" to which claimant was entitled under the Act of June 15, 1917 (40 Stats. 182), included claimant's expenses for special facilities but excluded its claim for anticipated profits on the unperformed part of the contract. The court below made no express ruling upon the contention of the claimant that the present contract was not within the purview of the Emergency Shipping Fund Act of June 15, 1917 (40 Stats. 182). From the judment so entered, the claimant has appealed.

SPECIFICATIONS OF ERROR.

1. The court below erred in holding that the provision in the Emergency Shipping Fund section of the Act of June 15, 1917 (40 Stat. 182), authorizing the cancellation of contracts by the President, applies to government contracts.

2. The court below erred in holding that brass cartridge cases for naval guns are "material" as that word is defined in the said act.

3. The court below erred in holding that the instant contract was made by the representatives of the President, under authority conferred by the said act.

4. The court below erred in holding that the provision in said act for "just compensation" to the contractor in case of cancellation of its contract, excluded any allowance to claimant for loss of anticipated profits on the cancelled part of the contract, and in giving claimant judgment only for the amount expended by it for special facilities on account of that part of the contract.

ARGUMENT.

Under the decisions of this court, claimant is entitled to recover in this case, as damages for the breach of its contract, the difference between the contract price of the 49,934 cases and what it would have cost to manufacture and deliver such cases, with a reasonable deduction for relief from the risks involved in claimant's obligation to complete the contract.

United States v. *Speed,* 8 Wall. 77, 85;
United States v. *Behan,* 110 U. S. 338;
United States v. *Purcell Env. Co.,* 249 U. S. 313, 317.

We understand it to be admitted by the appellee that the Naval Appropriation Acts of March 4, 1917, and July 1, 1918, providing for the cancellation of munitions contracts by the President, and the allowance of just compensation therefor, have no application to this case—the first-named act, because claimant's contract did not exist at the date of that act; and the second-named act, because that act was passed after July 23, 1917, the date of claimant's contract, and therefore cannot be held to have been had in view by claimant at that time.

We understand that the defence rests wholly upon the provisions of the Emergency Shipping Fund section of the Act of June 15, 1917 (40 Stats. 182), authorizing the President to cancel any existing or future contract for, among other things, the "equipment" of ships, and requiring that "just compensation" be made the contractor therefor; and upon the decision of the court below, in the unreported cases of the *Meyer Scale & Hardware Company* and of the *Russell Motor Car Company* (referred to hereafter as the *Meyer* case and the *Russell* case), that such just compensation cannot include an allowance for profits lost by reason of the cancellation of the contract.

We contend that the provisions of the last-mentioned act, in the respects mentioned, have no application to this case for the following reasons:

I.

The provision of the Naval Emergency Fund section of the Act of March 4, 1917 (39 Stats. 1192) authorizing the President to cancel any "existing or future contract" for the building, production, or purchase of ships or war material, did not, nor did the provision of the Emergency Shipping Fund section of the Act of June 15, 1917 (40 Stats. 182) authorizing the President to cancel any "existing or future contract" for the like items, apply to government contracts.

For the convenience of the court we print in the margin both of these Emergency Fund sections, together with notes from the British "Defence of the Realm" Acts and Regulations, on which those sections were modeled in part.[1]

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[1]NAVAL EMERGENCY FUND.
(Act March 4, 1917.)

To enable the President to secure the more economical and expeditious delivery of materials, equipment, and munitions, and secure the more expeditious construction of ships authorized, and for the purchase and construction of (certain naval small craft) to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary, and to be immediately available.

(The paragraph omitted here provides for the construction of 20 coast submarines, and appropriates $18,000,000 towards the cost of same.)

(a) That the word "person" as used in paragraphs (b) (c), next hereafter, shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

History of the Emergency Legislation.

The "Naval Emergency Fund" section of the Naval Appropriation Act of March 4, 1917, was an amendment of the bill, H. R. 20632, 64th Cong., and was offered in the House by Mr. Padgett, chairman of the Committee on Naval Affairs, in charge of the bill. He

(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quality usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any such factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war materials so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limits of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limits of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may

stated that the amendment was prepared by himself, the Attorney General, and Assistant Attorney General Warren, and that it was taken in part from a British statute, apparently the "Defence of the Realm" Acts and Regulations, as several of the provisions are almost literal copies from those publications. (Cong.

be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) Whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

EMERGENCY SHIPPING FUND.
(Act June 15, 1917.)

1. The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or materials as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable or being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver

Rec., Vol. 345, p. 2699.) Remarks of other members of the House on the amendment appear in the same volume at pp. 2699, 2700, 3137-3145. House Committee Reports on the bill were (64th Cong., 2nd Sess.) H. Rep. No. 1392, and Conference Rep. No. 1633.

The bill was brought up in the Senate by Mr. Swanson, acting for the chairman of the Committee on

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such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or materials so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph

Naval Affairs. Remarks of senators on the amendment appear in Cong. Rec., Vol. 347, pp. 4623, 4630, 4737. Senate Committee Reports on the bill were (64th Cong., 2nd Sess.) No. 1101 and Conference Rep. No. 1633.

The "Emergency Shipping Fund" section of the Military and Naval Deficiency Appropriation Act of

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twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

Provided, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The word "person" as used herein, shall include any individual, trustee, firm, association, company, corporation, or contractor.

The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

The word "material" shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof.

The word "plant" shall include any factory, workshop, warehouse engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard, or dockyard, and discharging terminal or other facilities connected therewith.

The words "United States" shall include all lands and waters subject to the jurisdiction of the United States of America.

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

The cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction and the expediting of construction of ships thus under construction shall not exceed the sum of $250,000,000, exclusive of the cost of ships turned over to the Army and Navy, the expenditure of which is hereby authorized, and in executing the authority granted by this act for such purpose the President shall not expend or obligate the United States to expend more than the said sum; and there is hereby appropriated for said purpose, $150,000,000: *Provided*, That this ap-

June 15, 1917 (65th Cong., H. R. 3971) was offered in the Senate by Mr. Martin, chairman of the Committee on Appropriations. (Cong. Rec., Vol. 351, p. 2511). His remarks on the necessity and purposes of the measure appear at p. 2526. The remarks of other senators on the amendment appear at pp. 2511-2530. It was stated by Mr. Underwood, a member of the committee (p. 2512), that the section was a rewriting of the like paragraph of the Naval Bill of March 4, 1917 (referring to the Naval Emergency Fund section), and that the only legislation the committee put in the section was that enabling the President to commandeer ships

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propriation shall be reimbursed from available funds under the War and Navy Departments for vessels turned over for the exclusive use of those departments or either of them.

The cost of construction of ships authorized herein shall not exceed the sum of $500,000,000, the expenditure of which is hereby authorized, and in executing the authority granted herein for such purpose the President shall not expend or obligate the United States to expend more than said sum; and there is hereby appropriated for said purpose, $250,000,000.

For the operation of the ships herein authorized or in any way acquired by the United States, except those acquired for the Army or Navy, and for every expenditure incident thereto, $5,000,000.

NOTES FROM THE BRITISH DEFENCE OF THE REALM ACTS.

The principal features of the British "Defence of the Realm" Acts and Regulations, relating to the commandeering of property and cancellation or modification of contracts, are, in substance, as follows:

1. The Admiralty or Army Council may require that the output of any factory or plant in which munitions or war supplies are produced, shall be placed at their disposal, and they may take possession of and use for naval or military purposes any such factory or plant. (5 Geo. V, ch. 8, sec. 3.)

2. It shall be a good defence to an action for breach of contract, that performance of the contract was prevented by compliance with the requirements or requisitions of the Admiralty or Army Council. (5 Geo. V, ch. 37; 7 & 8 Geo. V, ch. 25, sec. 3.)

3. A court being satisfied that, owing to any restriction imposed by or under the Defence of the Realm Regulations, any term of a contract

and shipyards. Senate Committee Reports covering the amendment were S. Rep. 41 and Conference Rep. Sen. Doc. No. 39.

The amendment was brought up in the House by Mr. Fitzgerald, chairman of the Committee on Appropriations. His remarks on the same appear in Cong. Rec., Vol. 351, pp. 3015-3024. Remarks of other members appear at pp. 3015-3024. House Committee Reports covering the amendment were H. Rep. 61 and Conference Reps. Nos. 67, 70, and 74.

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cannot be enforced without serious hardship, may, on application of any party to the contract, "suspend or annul" the contract on such conditions as it thinks fit. (7 & 8 Geo. V, ch. 25, sec. 2.)

4. The prices charged in a sub-contract for war supplies or services executed after June 13, 1917, may be revised by the Admiralty or Army Council, with right of appeal to a Royal Commission appointed under the Defence of the Realm Regulations. Any reduction of such prices shall be a credit on the amount due by the government to the principal contractor. (Reg. 2BB, Defence of the Realm Manual, 7th Ed., pp. 45, 46, printed and issued by the British government.)

5. The price of the factory output of munitions, stores, etc., requisitioned by the Admiralty or Army Council, shall, in default of agreement, be determined by three judges—one from the English, one from the Scotch, and one from the Irish courts. (Reg. 7, Defence of the Realm Manual, 7th Ed., p. 78.)

6. The Shipping Controller shall have power to requisition any ship or shipyard, and to "abrogate" or "modify" any contract or class of contracts affected by the order. (Reg. 39BBB, Defence of the Realm Manual, 7th Ed., pp. 138, 139, secs. 1, 3, and 5.)

7. Provision is made for a Royal Commission to hear and report on claims to compensation for direct loss or damages incurred through exercise of powers under the Defence of the Realm Acts and Regulations. (Supplement No. 3 to Manual of Emergency Legislation, p. 367, printed and issued by the British government.)

In a page by page examination of the Defence of the Realm Manual, 7th Ed., a British government publication of Emergency War Legislation from 1914 to 1918, counsel was unable to find any provision of the statutes or regulations that could be construed to authorize the annulment, or abrogation, or cancellation, of a government contract for war material or supplies of any kind. If any such statute or regulation exists, the defence is respectfully invited to point it out.

The Naval Emergency Fund Section.

The provision of this section in relation to the cancellation of contracts, is as follows:

> Second. Within the limits of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material.

The court below, in the *Russell* case (No. 485, Rec., pp. 135, 137), says that this clause applies only to government contracts, and cannot apply to private contracts, because it is not to be supposed that Congress intended to authorize anything so unjustifiable and uncalled-for as the modification or cancellation of a contract between private parties. And as that court makes its construction of the similar clause in the Act of June 15, 1917, largely dependent upon its construction of this clause, it becomes necessary for us to state the reasons why we think the court erred in its construction of this clause, and why the cancellation feature of the clause can be held to apply only to the cancellation of private contracts.

1. The act allows the President to cancel contracts "within the limits of the amounts appropriated therefor." The words quoted refer, *not to previous appropriations under which the then existing government contracts were made*, but to the appropriations, aggregating $150,000,000, then made by the act itself as the Naval Emergency Fund. Other than those appropriations there were none anywhere to pay the cost of modifying or cancelling "any existing contract for the building, production, or purchase of ships or war material." This fully appears from the discussion between Mr. Padgett, in charge of the measure, and Mr. Mann (Cong. Rec., Vol. 345, pp. 3143, 3144) and from

the remarks of Mr. Swanson, in charge of the measure in the Senate (Vol. 347, p. 4736).

The object of the fund was thus expressed:

> "To enable the President to secure the more economical and expeditious delivery of materials, equipment, and munitions, and secure the more expeditious construction of ships."

The President could not secure "the more economical and expeditious delivery of materials, equipment, and munitions," nor "the more expeditious construction of ships" by the cancellation of government contracts for ships or materials, but he might accomplish those purposes by the cancellation of private contracts which were at that time crowding the shipyards of the country and tying-up the government's shipbuilding program.

Nor would it have been possible for the President, by the cancellation of government contracts, to transgress the limits of the appropriations made for the fund, because the cancellation of such contracts would, under the construction put by the court below on the "just compensation" clause, reduce, instead of increase, the liability of the government. If the court below was right in its construction of the act, the effect of the cancellation would have been to relieve the government from existing liabilities, not to create new liabilities, and there would have been no need to "put a curb on the President" in the latter respect.

2. If it be true that this clause was intended to apply only to government contracts, then it would appear that the sole object of the provision was to enable the government to escape a part of its liability under its *existing* contracts for the production of war ma-

terial, because the clause in terms applied only to *existing* contracts, and because the "just compensation" to the contractor could not, according to the construction of the court below, include an allowance for profits lost by the cancellation. How singular the situation that would have resulted! The legislature would have deliberately set about impairing the obligation of the *existing* contracts of the government—something that could not have been anticipated by the contractor—at the same time refusing to make the provision applicable to *future* contracts, as to which the contractor could have protected himself by taking into consideration the liability of his contract to cancellation on the "just compensation" basis without an allowance for loss of his profits. Can anyone believe that such an embarrassing construction was anticipated or intended by the legislature? How would such a construction advance the object of the provision as expressed in the preamble, "To enable the President to secure the more economical and expeditious delivery of materials"?

3. The remarks of the chairman of the House Committee on Naval Affairs, in charge of the bill, during a colloquy on the floor of the House, show that he understood the cancellation clause in question to apply to the cancellation of private contracts.[2] As he was

[2]The following discussion took place between Mr. Padgett, chairman of the Committee on Appropriations in charge of the bill (H. R. 20,632) and Mr. Stafford as to the proportion of the "just compensation" allowance that should be paid immediately to the contractor or owner, under the provisions of the Naval Emergency Fund section of the bill. (Cong. Rec., Vol. 347, p. 4968.) (Italics ours.)

MR. STAFFORD. The gentleman can understand that it might be better for the interest of *private contractors* that they be paid a larger proportion (than 50%).

MR. PADGETT. It may be, but they did not ask for any more, and they expressed satisfaction with this.

one of the three draftsmen of the section,[3] he was in the best possible position to know what the intention of the clause was in that respect.

MR. STAFFORD. Who were these interested parties that were taken into the confidence of the conferees?

MR. PADGETT. I do not remember the name of the gentleman who was introduced to me this morning, but he said he was a shipbuilder, and he asked me if we would accept the proposal.

MR. STAFFORD. Did he have letters or credentials from the other *private contractors* of the country?

MR. PADGETT. If he did I did not know it. He did not disclose it.

This colloquy could have reference only to cases occurring under par. "Second" of the Naval Emergency Fund section of the bill, because none of the other paragraphs involve the rights of "private contractors". Consequently, it is clear that Mr. Padgett, the chairman of the committee in charge, understood that paragraph to apply to the cancellation of private contracts.

It is evident from the remarks of Mr. Lenroot below (Cong. Rec., Vol. 351, p. 3022), that the House was given to understand by the managers of the Naval Emergency Fund bill, that the cancellation clause of that bill was intended to apply to private contracts.

MR. CHAS. B. SMITH. Suppose a steel company is now manufacturing steel for some purpose that is not in connection with the war and not for the purpose of carrying on the war, and suppose the Government wants to cancel contracts of that character and take the steel for ships or to build cars. Should not the Government have the right to cancel those contracts?

MR. LENROOT. Absolutely, and that far I am not making the slightest objection.

MR. CHAS. B. SMITH. Does this do more than that?

MR. LENROOT. Yes; it does. For instance, a building is being erected in my town. The contractor owns the material. The Government desires not a pound of that material, but under this power it can suspend the erection of that building in my city or your city for the sole purpose of driving those men out of employment, and seeking to compel them voluntarily to seek employment elsewhere.

MR. CHAS. B. SMITH. Is not that an exaggerated assumption?

MR. LENROOT. No, it is not an exaggerated assumption, for the reason that in the naval bill at the last session—I am violating no confidence in saying that we were told *that power was desired in the naval bill for that express purpose* (referring to par. 2 of the Naval Emergency Fund section of the Act of March 4, 1917. Italics ours.).

[3]Cong. Record, Vol. 345, p. 2699.

4. The court below advanced nothing in support of its opinion that the clause in question did not apply to private contracts, except to say that it was not to be supposed that the legislature intended to do anything so uncalled-for and unjustifiable as to authorize the modification or cancellation of private contracts (*Russell* case, Rec., pp. 135, 137).

It is evident that the right to require performance of a contract for supplies is as much a chose in action as the supplies themselves are choses. It is also evident that the abrogation, or annulment, or cancellation, or suspension of such a contract between private parties by the government in order to make way for military or naval supplies in time of war, is, in effect, a taking or requisitioning of the contract for military or naval purposes. If it would be a proper exercise of legislative power to provide for the requisitioning of the choses—the supplies themselves—it is not perceived why it would not be equally proper for the legislature to provide for requisitioning the chose in action—the right of the one private party to require performance of the contract by the other.

It is to be observed that the British "Defence of the Realm" Acts and Regulations, on which the Naval Emergency Fund section was modeled, expressly provide, in various places, for the "annulment", "abrogation", "modification" and "suspension" of private contracts standing in the way of the expeditious procurement of military and naval supplies.[4]

The Emergency Shipping Fund Section.

This section of the Military and Naval Deficiency Appropriation Act of June 15, 1917, was likewise not a

[4]Ante, note, pp. 11, 12.

part of the bill as introduced in the House. (H. R. 3971, 65th Cong., 1st Sess.), but came in by way of amendment in the Senate.

The explanations of this measure in the two Houses by members of the committees that had it in charge, show that the whole object of the provision for the cancellation of contracts was to clear the shipbuilding and industrial plants of private contracts so as to expedite the production of military and naval supplies for the government.

The court below, in the *Meyer* case, refused to consider these explanations and discussions as throwing light on the question of the application of the provision to the cancellation of government contracts—this on the familiar ground that expressions of opinion by members of Congress, in the course of legislative debate, as to the meaning and scope of particular language in a bill, are not to be considered by the courts in arriving at the true construction of that language.

We do not ask the court to consider the views of members of Congress expressed in debate upon the question of the application of this cancellation provision to government contracts. *No question of that kind was raised in either House,* and consequently no views upon such question were expressed by members in discussing and explaining the amendment. What we do ask the court to consider is, the course of the two bills through the two Houses from the time of their introduction to the time of their passage, and the explanations of the amendments in question that were made on the floor by members of the committees that had the amendments in charge. We believe that the court will rise from its survey of the legislative situation with the clear conviction that it never entered the mind of any man in either House that there would be,

in the future, a claim that the amendments were intended to provide for the cancellation of government contracts.

If there was such an intent, how are we to account for the fact that in all the explanations of the amendment in either House there is not a line to indicate that intent on the part of those who made the explanations, nor of those to whom the explanations were addressed?

If there was such an intent, is it conceivable that there would be not a man on the floor of either House to make it known, nor to make an inquiry about it?

It has been several times held by this court that in case of doubt as to the true construction of a statutory provision, resort may be had to the report of the committee that had the measure in charge:

Holy Trinity Church v. *United States,* 143 U. S. 457;
The Delaware, 161 U. S. 459;
Butterfield v. *Stranahan,* 192 U. S. 470;
Lapina v. *Williams,* 232 U. S. 78;
Binns v. *United States,* 194 U. S. 486;
Duplex Printing Co. v. *Deering,* 254 U. S. 443;

In the first of these cases this court said:

> "In construing a doubtful statute, the court will consider the evil which it was designed to remedy, and for this purpose will look into contemporaneous events, including the situation as it existed, and as it was pressed upon the attention of the legislative body while the act was under consideration."

In that case the naked letter of the alien contract labor law would have prohibited the importation of skilled laborers into this country. This court resorted to the report of the committee in charge of the measure to show that the act was directed against the importation of common labor only. In that respect the case is very like this, in which the naked letter of the act, separated from the context, was held by the court below to apply to government contracts.

The formal reports of the committees having charge of these bills and amendments contain only figures and throw no light on the question of the application of the cancellation clause to government contracts, but the explanations made on the floor of each House by the chairmen of those committees are very helpful in that direction. In the last two of the above cases the explanations of the measure on the floor of the House by the chairman of the committee in charge, were treated as the equivalent of a further report by the committee itself, within the meaning of the rule. It will be seen from similar explanations by the chairmen of the two committees, in the instant case, that what was pressed upon the attention of the committees and of the two Houses, was, not the desirability of a provision for the cancellation of government contracts, but the necessity of a provision for the cancellation of private contracts (notably, those of the Cunard Steamship Company aggregating $100,000,000) as a part of the program for assuming control of the great steel and shipbuilding plants.[5]

[5]See the Committee Hearings sent by the chairman of the Senate Committee on Appropriations to the desks of senators while the amendment was being debated (Cong. Record, Vol. 351, p. 2511). See also the statement of Mr. Fitzgerald, chairman of the House Committee on Appropriations, in bringing up the amendment in the House, that his committee, when

It will be seen from the remarks of Mr. Underwood in the Senate (Vol. 351, p. 2514), that the whole of the "Emergency Shipping Fund" amendment was "new legislation" in a general appropriation bill, and therefore liable to be stricken out on a point of order. From his remarks, and those of other senators who joined in the discussion, it appears that the amendment was retained only because of the gravity of the situation and of the pressing necessity of expediting the building of ships as much as possible, and because of the insistence of the President and of Gen. Goethals, who was in charge of the shipbuilding program. If, as now claimed by the defence, the cancellation provision was intended to apply to government contracts, it would have made the amendment still more objectionable from the "new legislation" point of view, since the cancellation of government contracts would not have been germane to any of the provisions of the bill nor of the amendment, and it would have been a most singular thing that the senator, who supported the objection in committee, did not tell the committee that the provision was intended to apply to the cancellation of government contracts. The true explanation of his silence in that regard is that such a construction of the provision did not occur to him, nor to anyone then present.

In order that the Senate might be fully advised of the necessity and purposes of the Emergency Shipping

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" . . . confronted with the question of considering the Senate amendment, determined that the only authority it could include in the bill was that authority necessary to enable the ships to be secured rapidly with the commandeering powers." (Vol. 351, p. 3019.)

If Chairman Fitzgerald intended that the cancellation clause and the "just compensation" clause should be construed as the court below has construed them, that is, to enable the government to escape the full measure of its liability under its contracts by cancelling them *after the close of the war*, he misled the House in making the above statement.

Fund provisions, Mr. Martin, chairman of the committee in charge of the measure, caused copies of the Committee Hearings, containing the statement of Mr. Denman, Chairman of the Shipping Board, and of Gen. Goethals, in charge of the shipbuilding program, to be distributed in the Senate chamber during the discussion of the measure.[6] In view of the announcement of this court, in the Holy Trinity Church case, *supra*, that, in the construction of a statute, the court will look into the situation "as it was pressed upon the attention of the legislative body while the act was under consideration", we presume that the court will examine these Hearings, with the view of ascertaining what particular exigencies were to be met, and what obstructions removed by that measure, and whether any demand was made upon the committee for a pro-

[6]Cong. Record, Vol. 351, p. 2511. These Hearings, at one time "confidential print", but now no longer so, are Nos. 9 and 17, 65th Cong. H. R. 3971, and copies will be found in the files of the Senate Committee on Appropriations. We append below an extract from No. 17, which is directly in the teeth of the ruling of the court below, in the Russell case, that the cancellation clause of the contract has no application to private contracts. It is evident, from the remarks of Gen. Goethals, that he considered the commandeering of a speculator's shipbuilding contract, the equivalent of a cancellation or abrogation of that contract.

THE CHAIRMAN. In addition to that $500,000,000—if you commandeer these yards, you do not want to commandeer anything except shipyards?

MR. DENMAN. And ship contracts.

GEN. GOETHALS. And ship contracts.

THE CHAIRMAN. Do you want to commandeer the ship contracts and take over these English ships.

GEN. GOETHALS. England is only one of those having contracts. There are a number of speculators building ships in these yards for speculative purposes. Those are the people I would like to get after. They are filling up the ways—working eight hours a day, and tying up our constructive program. If we go into this thing at all, I want to get rid of those people.

vision that would authorize the cancellation of government contracts in case of a sudden termination of the war.

We here and now challenge the production of a single line in any document or print of any kind emanating from the government prior to the enactment of these amendments that would have a tendency to show that members, in voting thereon, understood that the provision for the cancellation of contracts applied to government as well as private contracts.

We likewise challenge the production of a single line of printed matter emanating from government sources prior to the close of the war in 1918, that would have a tendency to show that the idea of the application of the cancellation provision to government contracts was not an afterthought on the part of the War and Navy Departments—a mere becoming alive to the possibility of such a construction being placed upon the provision.

It is to be observed that the provision is for the cancellation of *existing* as well as future contracts, in which respect the construction given the section by the Court of Claims puts the two Houses in the attitude of authorizing the partial repudiation of government contracts. When the contract was made the contractor was, in case of cancellation, entitled under the decisions of this court to an allowance for loss of his profits. But the Court of Claims says that the "just compensation" directed by the act to be made him, covers only his actual expenses, with no allowance for loss of profits. The act, then, amounted to a confiscation of the contractor's rights, and a repudiation of the obligations of the government in that regard. If such was the intent and legal effect of the cancellation provision, it must have been known to those who had the

measure in charge. Does not the Court of Claims convict them of a want of candor in failing to notify members that the intent of the committee was to authorize the repudiation of government contracts to a certain extent, and that the measure under discussion would have that effect?

The reason why such an intent did not occur to anyone in either House undoubtedly was, that the cancellation provision, considered with reference to the ends to be obtained, showed on its face that it was intended to apply only to private contracts. The President was authorized, not "to cancel any contract", etc., but "within the limits of the amounts herein authorized, to cancel any contract", etc. The words "within the limits of the amounts herein authorized", could apply only to the cancellation of private contracts, because the cancellation of government contracts would add nothing to the liability of the government, so far as exceeding the limits of the emergency fund was concerned, the government being already liable for the contract price. The cancellation of the contract could not carry the liability of the government beyond the contract price, because the damages could not exceed the difference between the cost of production and the contract price. In fact, under the construction of the "just compensation" clause by the court below, the cancellation of government contracts would reduce instead of increase the liabilities of the government, and therefore make it unnecessary to impose a restraint upon the President in that particular. On the other hand, it was obvious that the cancellation of private contracts, bringing about enormous losses in the shipbuilding and other principal industries, might easily involve the government in liabilities in excess of the $250,000,000 authorized by the act.

The Court of Claims has wrenched the cancellation provision from its setting in the act, and construed it as if the qualifying and explanatory words "within the limits of the amounts herein authorized" were not there. They said nothing about those words in their opinion in the *Meyer* case and in the *Russell* case, and in so doing they violated the rule that every word in a statutory provision must be considered when the meaning of the provision is in dispute.

Another reason why nothing was said, and no inquiry made, on the floor of either House as to the application of the cancellation provision to government contracts, was that no legislation was required to authorize the cancellation of government contracts, nor to provide a remedy for the contractor injured by the cancellation. The government has at all times had the right to cancel its contracts, with liability over to the contractor in damages, and the contractor has always had his remedy in the Court of Claims, which right has been often exercised, with consequent suit by the contractor, as the reports of the decisions of this court will show. If the court below was right in its construction of the act, the only alternative is the supposition that the act was intended to provide a way by which, in case of a sudden and unexpected close of the war, the government could be relieved of a part of its contract liabilities at the expense of its contractors. We believe that this court will be slow to impute any such intention to the two Houses.

It is plain that the cancellation of contracts was to be a part of the process of "requisitioning or otherwise acquiring plants, material", etc., and therefore did not apply to government contracts. This appears from the following arrangement of the salient provisions of the amendment:

> "Within the amount herein authorized" "$250,000,000" for "the cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction" "the President is hereby authorized and empowered" "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material."

"Within the amount herein authorized". Authorized for what? For "the cost of purchasing, requisitioning, or otherwise acquiring plants, material", etc. What figure would the cancellation of government contracts cut in that cost? None, because the cancellation, under the construction adopted by the court below, would reduce instead of increase the outgo of the government.

Is there any good reason why those provisions should not be rearranged and read as above, and, so read, is it not clear that the cancellation of contracts was to be a part of the process of acquiring plants, material, etc., for which the incurrence of liabilities to the amount of $250,000,000 was authorized? If so read, the provision could have no application to government contracts, because the government could not commandeer its own contract, *and because by cancelling its own contracts the government would be getting rid of existing liabilities and not incurring new ones.* The act nowhere shows an intention to empower the President to cancel or modify a contract for the purpose of relieving the government from its liabilities thereunder. The object of the act was to enable the President to incur new liabilities in a manner not provided for by law, and this could only be, so far as

the cancellation of contracts was concerned, by the cancellation of private contracts.

Apart from the mere letter of the provision, wrested from its context and shorn of the explanatory and qualifying phrase "within the limits of the amounts herein authorized", the court below has been able to point to nothing in the act itself, nor elsewhere, to show that the cancellation of government contracts was intended by the provision in question, except they say:

1. The provision of the act,

> All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between the Government and the German Empire.

shows that the power to cancel contracts was intended to apply to government contracts as well as private contracts, because there would be no occasion to cancel or modify private contracts after the war. There would be much force in this argument if the powers of the President, under the amendment, were limited to the cancellation or commandeering of contracts. But inasmuch as they include holding and operating the commandeered ships, shipyards, plants, charters, etc., and as it was necessary that the government should retain control of the commandeered property some short while after the close of the war in order to wind up its operation and control of the property with as little loss and inconvenience to itself as possible, the argument drawn from the want of occasion to cancel private contracts after the close of the war, loses its force.

2. They say that the cancellation of private contracts was not intended, because it is not to be sup-

posed that the legislature intended to authorize anything so uncalled-for and unjustifiable as that. Our reasons for believing that argument unsound are given, *ante*, p. 17.

II.

Four-inch brass cartridge cases are not "material", and form no part of the "equipment" of a ship, within the Emergency Shipping Fund section of the Act of June 15, 1917.

The instant case differs materially from the *Russell* case, No. 485, and *Freygang* v. *United States*, No. 480, in connection with which it is submitted to this court. In neither of these cases is any question made that the *subject matter* of the contract was not within the terms of the Act of June 15, 1917. In the instant case it is earnestly contended that the rights of the parties are not governed by the provisions of that act, and that, therefore, the rule of damages should be the familiar one established by this court in

> *United States* v. *Purcell Env. Co.*, 249 U. S. 313-317 and earlier cases.

We submit that the contract now under consideration was for "*war material*" and, therefore, not covered by the terms and definitions of the Act of June 15, 1917.

Cartridge cases are munitions. The Act of June 15th does not apply to contracts for munitions. In each of the Acts, March 4 and June 15, 1917, an attempt is made to define the terms used. In the Act of March 4, 1917, this definition is as follows:

> "The words '*war material*' shall include arms, armament, *munitions,* stores," etc.

In the Act of June 15th, the definition is:

> "The word '*material*' shall include stores, supplies and equipment for ships, and everything required for or in connection with the production thereof."

A sharp distinction is made between the word "material" and the words "*war material.*"

It will be noted that the word "munitions" is excluded from this definition. As was stated by the court below in the *Meyer* case, changes and additions, as between the two acts, become significant. It is certainly significant that the language of the Act of March 4, 1917, under which the present contract cannot possibly be, differs in this material respect from the Act of June 15, 1917, which the defendant claims is controlling. It is respectfully submitted that cartridge cases can by no stretch of language be included in the terms "ships or material therefor".

In the *Meyer* case, the court below states that the word "material", as defined in the Emergency Shipping act, includes equipment for ships, and that scales are such equipment. Certainly, it cannot be claimed that cartridge cases and scales stand in the same class as material. Scales are equipment. Cartridge cases are "munitions".

Certain cases were cited in defendant's brief below in support of its contention that cartridge cases are covered by the Act of June 15, 1917, as part of the

"equipment" or "stores and supplies" of auxiliary cruisers or armed merchantmen. Those cases are not in point, because the question here is not whether, under some circumstances, cartridge cases might not be considered part of the equipment of an armed merchantman, but whether Congress having specifically provided, in the Act of March 4, 1917, for the cancellation of the contracts for "*war material*", and having placed cartridge cases, as "munitions", in that category, did not thereby exclude a contract for cartridge cases from the operation and effect of the Act of June 15, 1917, which provides for the cancellation of contracts for "*materials*" for shps, and for the inclusion of "equipment" and "stores and supplies" in the word "material" thus used. Upon that question the cases cited in the brief below have no bearing whatever.

Perhaps it may not be altogether clear why Congress should make the provision for the cancellation of contracts for the building of merchantmen applicable to both existing and future contracts, and limit to "existing contracts" the provision for the cancellation of contracts for the guns, shells and other war material with which the merchantmen were to be armed, nor altogether clear why a distinction should have been made between "materials" and "war materials" in the aplication of the two acts. Be that as it may, we respectfully submit, the courts are not concerned with the wisdom, the reasonableness, or the expediency of the limitation and distinction, and that it is their sole duty to give effect to the will of the legislature as it is here expressed.

III.

The instant contract was not made by the President, or his representatives, under the provisions of the Act of June 15, 1917, because it was made prior to the Executive Order of August 21, 1917, transferring the powers of the President under that Act to the Secretary of the Navy.

The instant case also differs in another important respect from the *Russell* case, No. 485, and *Freygang* v. *United States*, No. 480. In neither of these cases is any question made that the circumstances surrounding the making of the contracts brought them within the terms or limitations of the Act of June 15, 1917. The date of the contract in the *Russell* case was May 14, 1918, made in behalf of the government by the Acting Secretary of the Navy. The date of the Freygang contract was July 16, 1918, the United States contracting through the United States Shipping Board Emergency Fleet Corporation. In the *Anderson* case now submitted the contract was made under date of July 23, 1917, the United States acting through the Paymaster General of the Navy in ordinary course.

If the contract was not made under the provisions of the Act of June 15, 1917, then the provisions therein contained relative to "just compensation" in the event of cancellation, would not apply and the rule of damages would be, as above submitted, that formulated by this court in

> *United States* v. *Purcell Env. Co.*, 249 U. S. 313-317.

The court below held, in the *Meyer* case, that the contractor could not complain of the cancellation of his contract, because he knew, at the time of its execution,

that it was liable to be cancelled at any time under the Act of June 15, 1917. This, if correct, we submit, could apply only to those cases in which the contract was entered into, without advertisement, by the Secretary of the Navy in pursuance of authority given him by the Executive Order of August 21, 1917. In this connection claimant respectfully points out:

That the contract in the present case was made on the 23rd day of July, 1917; that on the 21st day of August, 1917, the President issued Executive Order No. 2687; that in said order powers were delegated to the Secretary of the Navy, which might be exercised directly by him, or through any officer or officers who, acting under his direction, have authority to make contracts on behalf of the government; that therefore, between the dates of June 15, 1917, and August 21, 1917, the date of the executive order, no power had been delegated to the Secretary of the Navy, nor through him, to any officer acting under his directions; that in this interval, that is, on the 23rd day of July, 1917, the contract in question was made; that, therefore, it was made in the ordinary and usual course of navy contracts, and not under the authority of the Act of June 15, 1917, nor of any executive order based thereon, and, hence, that claimant cannot be held to have had notice, at the time of the execution of the contract, July 23, 1917, that it was liable to be cancelled under the Act of June 15, 1917.

The claimant was invited to bid, and did bid, and as the lowest bidder, received th econtract. (Finding IV, Rec., p. 9.)

There is no evidence in the case of any correspondence or conference between the claimant and the representatives of the defendant prior to or at the time of

the making of the contract. Neither is there any reference in any of the correspondence, nor was there any conversation or any conference between the claimant and representatives of the government prior to or incident to the cancellation, in which any claim or statement is made that the cancellation was made or attempted to be made under any of the Emergency Acts or otherwise than in usual course.

The court below, in the *Meyer* case, pointed out the necessity of mutual agreement in arriving at a valid contract. The Circuit Court of Appeals for the Second Circuit in

> *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177,

emphasizes this necessity.

In this case, priority of a government contract over a civil contract under the Emergency Acts was claimed. The contract was in the ordinary contract form and not on an order form, under the commandeering statutes. The court after an exhaustive examination, in which the evidence of the representatives of the government and of the plaintiff was considered, reaches the conclusion that in order to bring the contract under the Emergency Acts, it must be understood by both parties and shown by the negotiations that if the contract were not accepted, the goods or the seller's plant would be commandeered by the government.

The court says, page 191:

> "When a manufacturer is given to understand that he is required to supply certain goods to the Government of the United States, and is told that he has no option to decline to comply, we are satis-

> fied that as to these goods an order has been placed and received within the spirit and intent and letter of the Statute."

Application for a writ of certiorari was made to this court and was denied.

> *Roxford Knitting Co.* v. *Moore & Tierney, Inc.*, 253 U. S. 498.

This denial impliedly stamps with the approval of this court the reasoning of the Circuit Court of Appeals.

Applying this test to the instant case. There is not a scintilla of evidence that the claimant was ever informed either prior to or at the time of the making of the contract, or prior to or at the time of the cancellation, that the contract was claimed to be made or claimed to be cancelled under the powers granted in any of the Emergency Statutes, nor was any tender made as required by those acts.

Was the claimant at any time given to understand that he had no option but to take the contract?

Most certainly not.

Was it understood by both parties and shown by the negotiations that if the contract were not accepted the plant would be commandeered?

Most certainly not.

And, yet this is the test which should be applied in determining whether the contract is or is not under the Emergency Acts.

Assuming that the claimant had been familiar on July 23, 1917 (the date of its contract), with the existing Emergency Acts, those of March 4, 1917 and June 15, 1917, and had noticed that one of them gave power to the President to contract for "*war material*" and

that the other did not, that "*munitions*" *were defined* as war material in the Act of March 4, 1917 (which act could not apply to this contract), that in the Act of June 15, 1917 there *was no mention of war material*, that its contract was for *munitions*, that it was in no way informed by the government officials when requested to bid that the contract was made under the Emergency Acts, can it conceivably be held that the officials of the Anderson Company knew or had any reason to think that they were acting under a compulsory order?

IV.

The provision for "just compensation" to the contractor, in case of cancellation of his contract, did not exclude an allowance to him for the profits he would have realized if the contract had not been cancelled.

It is obvious that the question of the application of the cancellation provision, in the Act of June 15, 1917, to government contracts, would be a matter of indifference to the contractor if, in case of such cancellation, he would have the benefit of the decisions of this court entitling him to an allowance for the profits he would have realized if there had been no breach of the contract by the government.

United States v. *Speed*, 8 Wall. 77, 85;
United States v. *Behan*, 110 U. S. 338;
United States v. *Purcell Env. Co.*, 249 U. S. 313.

Under these decisions, he would be entitled to recover, as damages for the breach, the difference between the contract price and the cost of production or performance.

The court below says that he cannot have the benefit of these decisions because, it says, the "just compensation" to which he is entitled under the act, includes only an allowance for special expenses incurred by him, and excludes any allowance for loss of profits.

In saying this the court necessarily imputes to the legislature an intent to provide a way by which the government would avoid a part of its liability for breach of its contract.

Did the Congress so intend?

Did the Congress anticipate such a construction of the words "just compensation" by the courts as would put it in the position of impairing the obligation of government contracts, and confiscating the property rights of the contractor?

If so, there is not a line nor a word in any printed matter issued by the government prior to the close of the war in 1918, that indicates such intent, or such anticipation of the construction that has been placed upon the words "just compensation" by the court below.

So far as government contractors were concerned, there was no occasion to provide for their "just compensation" or give them a remedy in the Court of Claims, because the decisions of this court determine what would be just compensation to them, and their remedy in the Court of Claims was already provided for.

Doubtless the reason why provision was made for these matters was that there has always been more or less of a question as to when an appropriation of private property by government agency amounts to a tort on the part of the agent, for which the government is not responsible, or furnishes ground for the implication of a contract to pay, in which case the

government is responsible. The jurisdiction of the Court of Claims depends, in this class of cases, upon the existence of the implied contract to pay, that court having no jurisdiction of a tort on the part of the government agent.

Langford v. *United States*, 101 U. S. 341;
Harley v. *United States*, 198 U. S. 229.

The object, then, of the provision for "just compensation" and for suit in the Court of Claims was to remove the possibility of the property owner being confronted with a question as to the liability of the government for the seizure of his property, or as to the jurisdiction of the Court of Claims in the premises.

The words "just compensation" were pitched upon in framing the measure because they were the most apt, suitable, and comprehensive for the purpose indicated. They were not put there for the purpose of enabling the government to escape a part of its liability for the breach of its contracts.

If the cancellation clause had been really intended to apply to government contracts, what would have been its purpose? Obviously, to relieve the government from its obligation to accept vast quantities of supplies that would not be needed in case of an early or unexpected close of the war. Yet the Court of Claims does not, in any of its opinions, even hint that such was the purpose of the provision. Why? Because, under the construction placed by them on the "just compensation" clause, the government would be put in the position of repudiating, in part, the obligations of its "existing" contracts for supplies, if it should cancel those contracts at the close of the war. The failure of the court below to refer to this phase of

the case, which cannot possibly have escaped its attention, is a confession of the weakness of its position.

In addition to the foregoing, we urge the following reasons in support of our contention that the court below erred in holding that "just compensation" does not include an allowance to the contractor for loss of his profits.

(a) It cannot be denied that in many cases there would be no other loss from the cancellation except loss of profits, and that the provision for just compensation to the contractor could not be enforced without an allowance to him for loss of profits.

For example: suppose a profitable contract in which the government furnished the plant and the materials and the contractor the labor only, and for the performance of which no special outlay by the contractor was required. Suppose the cancellation of this contract by the government when four-fifths completed—all earned compensation having been paid up to that time. How, in such a case, would it be possible to compensate the contractor except by an allowance for his loss of profits in respect to the uncompleted portion of the contract? Is he to be told that his paid compensation for the completed portion includes compensation for the cancelled portion also?

(b) The decision in question would make it necessary, in allowing just compensation, to distinguish between private contractors and government contractors, when there is nothing in the act to justify the distinction.

For example: suppose the requisitioning or commandeering of a plant engaged in the performance of a profitable private contract, and the operation of the

plant by the government for its own purposes. How would it be possible to give just compensation to the owner and contractor in such a case without an allowance to him for the loss of his profits on the work that was in progress? How could a reasonable allowance for the seizure of his property be made without taking into consideration the loss resulting from the destruction of his business? Or, suppose the commandeering of a contract between private parties for the manufacture of an article on which the contractor was making a profit of fifty per cent. Would not the United States, seizing the whole of the contractor's output of that article, be required in common honesty to pay him a price for the article that would yield him a profit of fifty per cent? If the act applies to government contracts, as contended by the defence, as well as to private contracts, it makes no distinction between them as to the just compensation to be awarded the contractor. Has the court the right to make such distinction and say that, in the case of the private contractor there may, and in that of the government contractor there may not, be an allowance for loss of profits?

(c) There is no authority to allow compensation except in those cases in which the contract was a profitable one; and hence the allowance must necessarily include prospective profits.

If the contractor was so lacking in judgment as to make a contract at a figure that would leave him nothing over and above his expenses, including those for special facilities, the cancellation of that contract would be a benefit to him, and hence afford no ground of recovery against the government.

We do not overlook, in this connection, the decision of this court in

United States v. *Behan*, 110 U. S. 338,

that where the government *wrongfully* discontinues work under a contract it is estopped to deny that the contractor would have made a profit, so far as his right to recover to the extent of his reasonable and necessary outlays is concerned. In that case, after the contractor had expended about $33,000 for labor and materials on a river improvement contract, the War Department abandoned the scheme as impracticable, and sent the contractor about his business without paying him a dollar for what he had done, and afterwards, when he sued to recover his expenses, raised the point that he would have lost money if he had been allowed to complete the work. No such situation is presented here. Both in this case and in that of the Meyer Scale Company every dollar of the contractor's expense for overhead, materials and special facilities was returned to it in the payments on the completed part of the work.[7] And, according to the government's own contention, it did not *wrongfully* stop the work, because, it says, the statute allowed it to cancel the contract, and that claimant knew,

[7]See Finding XIII, Rec. p. 13. It is shown, also, by this finding that if the full amount claimed by plaintiff were allowed it, its profit on the whole contract would have been a small fraction over 20 per cent. Therefore the allowance of only $43,727.71 of the amount claimed ($96,102.97), was really, though not nominally, a reduction of its profit on the whole contract from 20 per cent to 15½ per cent. Hence it seems that the plan, evolved in the War and Navy Departments, of allowing the contractor for his special expenses, and raising an amortization account for that purpose, was nothing more than a plan for cutting down his profits to a figure that they would be willing to allow.

when it undertook the work requiring special facilities, that the contract was liable to be cancelled at any time. The decision is therefore not inconsistent with our contention that if it can be shown, in cases arising under the Act of June 15, 1917, that the contract price was too low to admit of any profit to the contractor, he would not be entitled to anything under the act.

But entirely apart from the foregoing, the claimant contends that the contract is not governed or controlled by the provisions of the Act of June 15, 1917, as has been heretofore argued in this brief, and that therefore the *Behan* case, last above cited, is a direct authority in support of its contention that it is entitled to recover the profits which it would have made on the cancelled portion of its contract.

The severe criticism of the contract in the *Meyer* case by the court below would indicate that its opinion was, to some extent, influenced by the excessive profits that the contractor would have realized if its claims had been allowed. We do not suppose that the judgment of this court will be affected by considerations of that kind. But if we are mistaken in that, we have only to say that our contract is beyond criticism in that respect; and that we are not advised of any case in which the ignorance, inexperience, or carelessness of the contractor in fixing the contract price, has been held an adequate defence to the claims of the United States growing out of non-performance of the contract by him.

The court below rendered judgment in favor of plaintiff for the exact amount ($43,727.71) of that portion of plaintiff's expenditure for special facilities

that it found to be chargeable to the unperformed part of the contract. (Finding XII, Rec., p. 13.) Consequently, it made no finding as to what amount, if any, should be deducted from the recovery on account of relief from risk, if any, involved in full performance of the contract.

Possibly, the court regarded such risk, if any, as negligible, in view of its findings that all the materials for the contract product were furnished by the government, and that, if not interfered with by "priority orders" of the government, plaintiff could have completed the contract within sixty days from the time it stopped work on the cases. (Findings IV and X, Rec., pp. 9, 12.)

It is respectfully submitted that the judgment of the court below should be reversed, and judgment rendered by this court in favor of plaintiff for the sum of $96,102.97, pursuant to Finding XI, Rec., p. 13.

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